

UNITED STATES OF AMERICA
Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Complaint on First-Class Mail
Service Standards

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Docket No. C2001-3

ANSWER OF THE OFFICE OF THE CONSUMER ADVOCATE
TO UNITED STATES POSTAL SERVICE MOTION TO DISMISS COMPLAINT
(August 14, 2001)

The Office of the Consumer Advocate ("OCA") hereby answers the motion of the United States Postal Service to dismiss the complaint of Douglas F. Carlson on First-Class Mail service standards.¹

INTRODUCTION

The complaint, filed June 15, 2001, indicates that the Postal Service adjusted service standards in 2000 and 2001 for 2-day and 3-day First-Class Mail for over 76,440 origin-destination three-digit ZIP Code pairs. The complaint alleges that the Postal Service failed to seek an advisory opinion pursuant to §3661(b) of the Postal Reorganization Act before implementing those changes affecting service standards on a nationwide or substantially nationwide basis. (Complaint at 3.) The complaint also alleges that the Postal Service implemented changes in First-Class Mail service standards that have caused First-Class Mail service not to be adequate within the meaning of §3661(a) of the Postal Reorganization Act. (Complaint at 4.) The complaint further alleges that the Postal Service has created First-Class Mail service standards

¹ "Motion of the United States Postal Service to Dismiss Complaint," July 30, 2001.

that unduly and unreasonably discriminate among users of the mail, in violation of 39 U.S.C. § 403(c). (Complaint at 4.) The Postal Service's answer, on July 13, 2001, denied that the complainant is entitled to relief and denied that the Commission has jurisdiction or that the Commission should exercise jurisdiction to hear the subject matter of the complaint. (Answer at 18.)

Pursuant to Postal Service motion,² the Commission provided for the filing of the Postal Service's dispositive motion to dismiss the complaint by July 30, 2001, and ordered that participants shall file, if they choose to do so, an answer to the Postal Service's motion to dismiss by August 14, 2001.³ This answer responds to the Postal Service's motion.

SUMMARY OF OCA ANSWER

The OCA believes that the complaint, together with the Postal Service's response to the complaint and the Postal Service's motion to dismiss, have raised sufficient issues of law and fact such that the Commission should deny the Postal Service motion to dismiss. The Commission should establish further procedures to allow participants to undertake a more detailed inquiry into the facts alleged in order to create a full record for the Commission to reach a reasoned decision as to the appropriate disposition of the complaint.

To assist in obtaining a full record, the Commission should order the Postal Service to provide the results of "relevant and appropriate investigations of the cost

² "Motion of the United States Postal Service for Extension of Time to File a Dispositive Motion," July 12, 2001.

³ "Order Granting United States Postal Service Motion for the Extension of Time," July 13, 2001.

consequences of changes in delivery standards" undertaken by the Postal Service in relation to the service standard changes in 2000 and 2001. The Commission previously recommended in its opinion in Docket No. N89-1 that the Postal Service undertake such studies before implementing nationwide service changes.⁴

POSTAL SERVICE ARGUMENT

The Postal Service's motion to dismiss contends that the complaint raises two points: (1) that the Postal Service violated §3661 of the Act by failing to obtain an advisory opinion before changing First-Class Mail service standards on a nationwide or substantially nationwide basis and (2) that the service standard changes are not in accord with the various policies of the Postal Reorganization Act. The Postal Service does not dispute that the changes described in the complaint were implemented. (Motion at 2.)⁵ However, the Postal Service contends the service standard changes were not implemented in a manner contrary to §3661 and that none of the service standard changes violates any of the policies of the Act. (Motion at 3.)

The Postal Service essentially contends that the complaint is misplaced because, in implementing modifications to the 2-day and 3-day service standards, the Postal Service was completing the final phases of implementation of the program for which the Postal Service sought an advisory opinion from the Commission in Docket No. N89-1. In support of this argument, the Postal Service says that "the recently implemented

⁴ *Change in Service, 1989 First-Class Delivery Standards Realignment*, Docket No. N89-1, "Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services," July 25, 1990.

⁵ Recently in another proceeding, the Commission considered a motion to dismiss where the Postal Service did not challenge the complainant's recitation of the facts of the case. The Commission noted that for purposes of evaluating the motion, the Commission assumes the facts to be as alleged in the complaint. *Joseph B. Hurvitz, et al.*, "Order Dismissing Complaint," June 15, 1999 at 4, note 7.

changes are the belated completion of the comprehensive plan first presented and reviewed nearly a dozen years ago.” (Motion at 4.) The Postal Service relies upon the Gannon Declaration attached to its motion to dismiss in support of its claims regarding the reasons for the lengthy delay in implementation of the 2-day and 3-day service standard changes. The Postal Service also contends the specific allegations do not raise issues regarding service on a nationwide or substantially nationwide basis.

DISCUSSION

A. The Recent Changes Affecting Nationwide Service Standards Were Revisions of those Changes Proposed in Docket No. N89-1

The Postal Service claims that it has already sought an advisory opinion from the Commission for what amounts to the final phases of program implementation. This claim appears inconsistent with the Postal Service’s admission in its motion to dismiss that the specific changes implemented were not contemplated in the proposal submitted in Docket No. N89-1. The motion to dismiss states, “The Postal Service readily concedes that some of these features of the Phase 2 finalization process were never contemplated by its Docket No. N89-1 witnesses and, consequently, finalization of Phase 2 does not mirror the implementation of Phase 1 or the initial pass at Phase 2.” (Motion at 20.) Further, the Gannon Declaration candidly recites many new alterations and changes to the original proposal that was considered and reported by the Commission in Docket No. N89-1. For instance, Mr. Gannon states that after the 1991 2-day and 3-day adjustments, “there were not significant additional changes until those at issue in this proceeding.” (Gannon Declaration at 3.) This statement appears to concede that the changes in 2000 and 2001 were both significant and different from the

changes contemplated in 1989. Mr. Gannon also indicates that in 1998, Postal Service COO Henderson tasked Mr. Rapp with responsibility for review of First-Class Mail service standards to ensure they were fair, equitable and achievable. (Gannon Declaration at 5.) Although Mr. Gannon notes these are the same goals as under the Docket No. N89-1 proposal, it is apparent that Mr. Henderson's task was a new assignment for a new program.

Mr. Gannon further states that the National Transportation Team working on the service standards "established National parameters" regarding clearance times and critical entry times at processing plants for transportation windows which were used to plan transportation across the "*national* network." (Gannon Declaration at 7, emphasis supplied.) The team then reached another new decision and "decided upon a maximum 12-hour highway drive-time to determine those destinations that would become part of the 2-day service area for any Processing Plant of origin." (Gannon Declaration at 8.) The decision to use a 12-hour drive-time (rather than some other period of time, or a set standard mileage measurement, or great circle distances) is a decision having nationwide impact that directly affected a change in the nature of service nationwide that was not included in the original proposal in Docket No. N89-1. Mr. Gannon recognized the nationwide application of the 12-hour drive-time standard in his declaration: "While this is correct, Alaska standards were not changed, and those Nevada offices that are 3-days were beyond the 12-hour drive-time, which was *applied nationwide*." (Gannon Declaration at 14, emphasis supplied.)

Mr. Gannon also said the Team "built a computer model which used a customized transportation software package to determine reasonable and safe drive-

times between postal facilities.” (Gannon Declaration at 8.) This is an underlying aspect of the changes that was not considered in Docket No. N89-1. The parameters of the computer model would clearly affect the outcome of the estimated drive-times and, consequently, affect nationwide the service standards derived from the computed times.

Mr. Gannon also notes that the review of the service standards “began in 1998” rather than in 1989. (Gannon Declaration at 10.) He also noted the recent “process of determining what changes to make” differed from the process initially contemplated in Docket No. N89-1. The Postal Service and Mr. Gannon readily admit (Motion at 10) that management and personnel changes within the Postal Service team responsible for revising the service standards were extensive and that a lengthy time between the Docket No. N89-1 opinion and the implementation of modifications has passed and that Phase 2 of the original plan was altered.

All of the above statements by Mr. Gannon indicate that the recent service standard changes were affected by several new factors that were not a part of the original proposal reviewed by the Commission in Docket No. N89-1. Thus, it is reasonable for the Commission to proceed on the complaint as if a new program proposal is at issue not a revisiting of a previously reviewed case.

B. §3661(b) Requires Proposals To Be Filed Within a Reasonable Time Prior to the Effective Date of the Proposal

Even if the Postal Service has properly claimed that the service related changes were the subject of the advisory opinion in Docket No. N89-1, the proposals were not filed within a reasonable time prior to their effective date as required by §3661(b). The Postal Service’s motion to dismiss does not address this issue of law. A fair reading of

the language suggests the law requires the Commission to consider now the recently implemented changes. The “reasonable time” standard implies both that the Commission have an opportunity to consider changes before their implementation and that implementation take place reasonably promptly after the Commission’s advisory report. The Postal Service’s claim that it is now making changes loosely based on a Commission report issued over eleven years ago hardly meets either the letter or spirit of §3661.

Even assuming that the recent implementation can be related to the earlier case, the express language in §3661(b) provides that the Postal Service shall submit a proposal “within a reasonable time prior to the effective date of such proposal.” This suggests that the Postal Service’s request in Docket No. N89-1 was not within the time frame contemplated by §3661(b) for implementation in 2000 and 2001. Although the Commission has recently found that §3662 allows the Postal Service the discretion to take action it deems appropriate on the findings in a public report (PRC Order No. 1307 at 16, March 20, 2001), common sense suggests that the framers of the statute did not contemplate a 12-year span between a request for an advisory opinion and the implementation date of a change in nationwide service.

Although the Postal Service’s motion to dismiss goes to great lengths to assure the Commission that the recent changes are the progeny of the long delayed programs commenced more than a decade before the turn of the century, the Postal Service does not deal with the troublesome language in §3661 that indicates a request for a more current advisory opinion is required by the Act.

C. Arbitrary Changes in Service and other Alleged Violations of the Law

The Motion to Dismiss also contends that whether or not the changes are substantially nationwide, they do not warrant review under §3662 of the Act because they are not arbitrary. (Motion at 26.) The Commission's rules, §3001.82, state that the Commission shall entertain only those complaints which clearly raise an issue as to whether services contravene the policies of the Postal Reorganization Act. The Commission has jurisdiction to consider complaints where circumstances indicate an operational policy is arbitrarily discriminatory on its face or is implemented in a discriminatory manner.⁶ The complaint raises these issues of discrimination and at present, without further review, there is not enough information to determine that the service policy changes do not operate in a discriminatory manner.

The changes are also said to be "Individualized" or "Localized" in nature (Motion at 29), and that they do not result in "Undue or Unreasonable discrimination." (Motion at 32.) The motion to dismiss also contends that the complaint does not demonstrate that the adequacy of service is affected to the extent warranting review by the Commission. (Motion at 39.)

Although mere downgrading of service does not render the service inadequate (Motion at 40), it is not certain that the service downgrades have not had an impact on the service that might be otherwise avoided or mitigated. The Commission's report in Docket No. N89-1 noted that answers to two critical questions were not available in the record: (1) What is the projected percentage improvement in meeting service

⁶ See *Complaint of Joseph B. Hurwitz, et al.*, Docket No. C99-3, "Order Dismissing Complaint," June 15, 1999, at 10.

standards? (2) Of this improvement, what portion is attributed to improved operations, and what portion is nothing more than a downgrading of service standards (i.e., changing the service standard to conform to current service levels)? (PRC Opinion Docket No. N89-1 at 14.) The extent to which the changes meet localized needs rather than national service requirements is not clear, nor is the extent of the trade-off between consistency and speed of service.

Also, although the Postal Service suggests the complaint's concentration on service between the San Francisco Bay area and five other western cities is a localized issue, the Commission should consider whether the type of factual situation discussed applies to several other areas such that it rises to a "nationwide or substantially nationwide" issue.

The Postal Service further claims that the Gannon Declaration demonstrates "the switch to a 3-day service standard conforms to the criteria for distinguishing 2-day and 3-day service which were reviewed in Docket No. N89-1." (Motion at 46.) This claim may or may not be correct, even though supported on the face of the Gannon Declaration. Moreover, the actions of the Postal Service may or may not be consistent with the Commission's advice in its report in Docket No. N89-1, that the Postal Service unilaterally review and adjust service commitments to meet local conditions. (PRC Op. Docket No. N89-1 at 41.) The complaint raises issues that need to be considered further and the facts asserted ought to be tested in proceedings before the Commission reaches a conclusion on the merits of the complaint. The Commission should therefore provide for interrogatories and even hearings, if necessary, to determine whether the

complaint is warranted and whether to issue an opinion pursuant to §3661 and or a report pursuant to §3662.

D. Proposal for Commission Action

The Postal Service asks what would be accomplished by a hearing. (Motion at 46-7.) The Commission could, after review of the facts, issue an opinion that the Postal Service did not follow the statute and failed to seek an advisory opinion from the Commission prior to its implementation of the new service standards. Such an opinion could lay out the criteria for future actions under the statute and perhaps demonstrate that the Postal Service does not have *carte blanche* to revise and implement programs a decade after they have been considered by the Commission.⁷ The Commission ought to provide for further procedures to enable interrogatories and, if the Commission deems that the actions of the Postal Service have changed service standards so as to constitute a new proposal, then an opportunity for hearing on the record under §§556 and 557 of title 5 should be accorded to the interested parties pursuant to §3661(c). Further, the pleadings do not necessarily resolve the question of whether the newly implemented service conforms to the policies of the Act pursuant to §3662.

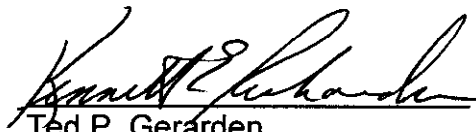
Finally, as recommended in the advisory opinion in Docket No. N89-1 at 41, the Commission should direct the Postal Service to provide any "relevant and appropriate investigations of the cost consequences of changes in delivery standards" performed prior and subsequent to the implemented changes.

⁷ Recently in Docket No. C2001-1, the Commission concluded that the Postal Service was required to seek an advisory opinion on a decision in 1988 to change the level of Sunday collection and processing service, but had failed to do so. The Commission concluded that no purpose would be served by reviewing this change 12 years later. (Order No. 1307 at 13-14.) In this case, however, implementation is contemporary and can effectively be reviewed by the Commission. The Postal Service should be encouraged to comply with §3661, not to avoid it.

Wherefore, the OCA urges the Commission to deny the Postal Service's motion to dismiss and further suggests that the Commission provide for further proceedings as noted above,

Respectfully submitted,

OFFICE OF THE CONSUMER ADVOCATE

A handwritten signature in black ink, appearing to read "Ted P. Gerarden", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.

A handwritten signature in black ink, appearing to read "Kenneth E. Richardson", written over a horizontal line.

Kenneth E. Richardson

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August 14, 2001